RECENT DECISIONS

BANKRUPTCY—PREFERRED CREDITOR'S SETOFF. A creditor who received a preference under Section 60*a*, but without knowledge or reason to believe that it was a preference, and who later sold the bankrupt goods without security, is *held* under Section 60*c*, entitled to set-off the amount of this subsequent sale from the preference received, and, on payment of the excess of the preference, to prove his claim. *McKey* v. *Lee*, 5 Am. B. R. 267 (C. C. A. Ill. 1901). SEE NOTES.

BANKRUPTCY—REVOCATION OF DISCHARGE. A petition alleging fraud committed several years prior to the adjudication, when there is no proof that the discharge was obtained through fraud, or that the knowledge has come to the petitioners since the granting of the discharge, *held*, insufficient to revoke a discharge according to Section 15. *In re Hoover*, 5 Am. B. R. 247 (D. C. East. Dist. Pa. 1900). SEE NOTES.

BILLS AND NOTES—GUARANTY ATTACHED—NEGOTIABILITY. The payee of a promissory note endorsed in blank without recourse, and in addition attached a guaranty of payment within a specified time after maturity, and fixed certain conditions in case of maker's default. *Held*, that the guaranty rendered the note non-negotiable. *Doe* v. *Callow*, 63 Pac. 603 (Kas., Jan. 1901).

This decision can be supported neither on principle nor by virtue of any peculiar doctrine of the jurisdiction. The cases relied on by the Court are not authority for the position taken. In *Lyon* v. *Martin*, 31 Kas. 413 (1884) cited, the only point bearing directly on the law of bills and notes is a holding that a waiver of all relief from valuation, appraisement, stay or exemption does not destroy the negotiability of the instrument. In *Briggs* v. *Latham*, 36 Kas. 209 (1887), the action was brought by a holder subsequent to the contract of guaranty against a guarantor who neither executed the instrument, was ever liable upon it, nor received any consideration. *Killam* v. *Shoeps*, 26 Kas. 310 (1881), was a holding in accordance with settled law, that an instrument so involved with other matters as to lose its character as a commercial instrument was not negotiable. In the principal case the guarantee was by a regular endorser on the paper, had no effect until after maturity, and could operate in no way as a drag on the negotiability of the instrument.

BILLS AND NOTES—INTEREST—INABILITY TO MAKE DEMAND. By a statute of Colo. (Laws of 1889, p. 206, Jan. 2) interest is recoverable on money due on account from maturity. The defendant bank had temporarily suspended payment. On the day it resumed, plaintiff demanded his deposit and was paid, but claimed, in addition, interest during the time of suspension on the ground that such a fact made a demand unnecessary to fix the defendant's liability. The Court refused to allow interest before a demand. *Patten* v. *American National Bank of Denver*, 63 Pac. 424 (Colo., Jan., 1901).

In Colorado, wherever there is no agreement as to interest, it is restricted to statutory instances and the statute receives a strict interpretation. *Denver S. P. & P. R. Co.* v. *Conway*, 8 Colo. 16 (1884). Aside from these conditions even, the principal case represents a sound view, and the one taken in at least one other case, *Sickles* v. *Herold*. 43 N. E. 852 (N. Y., 1896). The undertaking of the bank is to repay only upon demand, and here there was no intention shown to bring the debt to maturity prior to the time the deposit was paid. The insolvency of a bank is not to be inferred from the appointment of a temporary receiver, and, therefore, this case is to be distinguished from that of insolvency where a demand is unnecessary. On any other theory the

bank would be liable to pay interest on all deposits, irrespective of whether or not the creditors of the bank would have elected to demand, and so bring their accounts to maturity.

CONSTITUTIONAL LAW—CONTROVERSIES BETWEEN THE STATES—JURISDICTION OF UNITED STATES SUPREME COURT. Original bill by the State of Missouri against the State of Illinois and the Sanitary District of Chicago, a public corporation organized under the laws of the State of Illinois, to prevent the discharge of sewage into the Mississippi River through the Chicago drainage canal. *Held*, on demurrer, that the United States Supreme Court had jurisdiction over the defendant State as well as over the defendant corporation, citizen of that State. *State of Missouri* v. *State of Illinois*, 21 Sup. C't. Rep. 331 (Jan. 28, 1901).

This case decides squarely that under Article III, Section 2, U. S. Const. whenever one State may choose to make complaint before the Supreme Court of the United States against another State for any act of the defendant State done by its legislature, officers or other agents, the defendant State cannot demur to the jurisdiction of the Court. The complainant State is the sole judge of whether it should feel aggrieved or not. It makes no difference whether the supposed injury concerns the extent of the sovereign jurisdiction of the complainant, as in boundary dispute cases [cf. *Rhode Island* v. *Massachusetts*, 12 Peters, 657 (1832)]; or whether, as in the present case, the injury affects mere property rights of the complainant State or its citizens. The question arises as to what decree the Court will eventually make in this case if it should decide in favor of the complainant. It could hardly compel the Illinois Legislature to legislate on the matter. But this does not seem a valid objection against taking jurisdiction over the State of Illinois. For any decree prohibiting the discharge of sewage into the Mississippi River will be more effective if directed against the "State of Illinois and all or any of its agents" than if directed only against the single co-defendant in this case, the Sanitary District of Chicago.

CONTRACTS—CONSIDERATION VOID IN PART. In consideration that plaintiff promised to care for defendants' testator till his death, and to refrain from marriage, testator agreed to provide amply for her in his will. The promise not to marry was void as against public policy. *Held*, that where the consideration for a promise is two-fold, part of which is void, the other part, if good, will support that promise. And that where the void promise is incidental to the main engagement, which has been performed, an action will lie for such performance by the other party. *King* v. *King*, 59 N. E. 111 (Ohio, Nov., 1900).

It is well settled that where a promise is based upon two considerations, one of which is void for insufficiency, if the other be good the promise will be enforced. *King* v. *Sears*, 2 Cromp. M. & R. 48 (Exchequer, 1835). *Chitty on Contracts*, 9th Edition 56. But it is equally well settled, that where the contract is entire, and part of the consideration is illegal, the whole contract is bad. *Derg* v. *Chapman*, 9 Shep. 488 (Me. 1843). *Filsoms* v. *Hines*, 5 Barr. 452 (Pa. 1846). *Loomis* v. *Newhall*, 15 Pick. 159, (Mass., 1833). The principal case would seem to be of this nature. *Metcalf on Contracts*, Boston, 1867, p. 221. *Chitty on Contracts*, and cases cited above. Certainly there is no authority in the court to say what part of the contract is important, and what immaterial. This would be making an agreement for the parties, not enforcing one they have made. 2 *Parsons on Contracts*, 5th Edition, 505.

CONTRACTS—OFFEREE'S KNOWLEDGE OF OFFER. One who takes a folded paper from an express agent, containing a special contract limiting the company's liability, is not bound thereby, unless he knew it to be such, or actually had knowledge of its contents. *Springer* v. *Westcott*, *New York Law Journal*, March 14, 1901.

The decision follows the long line of authorities in this State on the same point, and decides the question of fact in a similar way. *Blossom* v. *Dodd*, 43 N. Y. 264 (1870); *Madan* v. *Sherrard*, 73 N. Y. 329 (1878);

Grossman v. *Dodd*, 63 Hun, 324 (1892). In cases of bills of lading, the same Court has decided that the shipper is affected with notice of the stipulations contained therein, whether he has read the paper or not. *Hill* v. *R. R. Co.*, 73 N. Y. 351 (1878) *Zimmer* v. *R. R. Co.*, 137 N. Y. 460 (1893). And so in passenger tickets for transportation on ocean steamships. *Steers* v. *Steamship Co.*, 57 N. Y. 1 (1874); *Fonseca* v. *Steamship Co.*, 153 Mass. 553 (1891) *accord.* The reason given is that those transactions are of such common occurrence, and steamship tickets and bills of lading are so universally known to contain conditions and stipulations, that the one receiving such instruments is considered to have assented to their terms, irrespective of his actual knowledge thereof. In these days, certainly, contracts for baggage carriage by express companies are as frequently engaged in as contracts for freight, and ocean transportation, and it might be reasonable, perhaps, to say that the principle of the latter cases is equally applicable to the former. *Watkins* v. *Rymill*, 10 Q. B. Div. 178 (1883).

CORPORATIONS—STATUTORY LIABILITY OF DIRECTORS NOT PENAL. Defendant, director of corporation organized in So. Dakota, by statute of incorporation, was there individually liable for all debts contracted in excess of capital stock. *Held*, such liability is contractual, not penal, and could be enforced in any State. *Farr* v. *Briggs*, 47 Atl. 793 (Sup. Ct. of Vt., April 13, 1900).

This case is against the great weight of decisions, but in accord with views of text writers. It is well settled penal statutes are not enforceable except in State where enacted. Story, *Conf. Laws*, §§ 620, 621. But urged that statutory liability of directors is usually not penal in criminal law sense, but a private obligation, similar to that of sureties, and imposed for the double purpose of inducing directors to do their duty and of securing creditors from loss. *Morawetz, Corporations*, §§ 907–8; *Cook, idem*, § 323; *Thompson, idem*, §§ 3052, 4164–6, 8525–6. This would also seem to be the trend of recent decisions: *Huntington* v. *Attril*, 146 U. S. 657 (1892), distinguishing between statute to punish offense against public justice of State, and one to afford private remedy to person injured by wrongful act; *Same* v. *Same*, Privy Council (1893), App. Cases, 150, that liability to be penal must be in nature of suit in favor of State whose law is infringed. See also *Brady* v. *Daly*, 175 U. S. 148 (1899), at p. 155. *Contra: Stokes* v. *Stickney*, 96 N. Y. 323 (1884); *Carr* v. *Rischer*, 119 N. Y. 117 (1890). And cf. *Marshall* v. *Sherman*, 148 N. Y., 9 (1895).

DOMESTIC RELATIONS—CONTRACT OF MARRIED WOMAN—VALIDITY OF JUDGMENT. Husband and wife made a joint note under the common law. Later the Weissinger Act was passed authorizing a married woman to sue and be sued as a *feme sole*. Suit was then brought on the note and judgment against the wife obtained and now held valid. *Howard* v. *Gilson*, 60 S. W. 491 (Ky., Jan. 1901).

This Court relies solely on the authority of *Turner* v. *Gill*, 49 S. W. 311 (Ky., 1899), but misinterprets the doctrine of that case. The question there was one of pleading, not whether the note was a valid obligation. The Court says, referring to the status of the wife, after the passage of the Act in question: "She stands before the law * * * just as a divorced woman or a widow would have stood prior to the passage of the Statute referred to, if sued upon an obligation made during her coverture." The Court does not mean that a note invalid because of coverture is valid when the woman becomes sole. They say judgment could not be taken against a married woman, because it is but a contract of record and would not be binding upon her; the Act removes that objection. The defendant must plead her coverture specially; this she deliberately refused to do when she had her day in Court, and the judgment shall stand. Nevertheless it is established that the note of a married woman at common law was not merely suspended during coverture, not voidable and subject to ratification, but absolutely void. *Waul* v. *Kirkman*, 25 Miss. 609 (1853); *Parkman* v. *Tennyson*, 50 Ind. 456

(1875). In the principal case the note was void and the plaintiff stated no cause of action upon which a judgment could issue.

DOMESTIC RELATIONS—FRAUDULENT DIVORCE—ANNULMENT. Defendant, after a divorce secured by fraud, married a second husband. After his death she claims an interest in the estate, whereupon his heirs make application to have the decree of divorce set aside. *Held*, that plaintiffs have not sufficient interest to maintain their suit. *Tyler* v. *Aspinwall*, 47 Atl. 455 (Conn., Jan. 1901).

Upon proof of fraud in the procurement of a judgment the party defrauded may have it vacated at any time. *Cannan* v. *Reynolds*. 5 El. & B. 301 (1855). And relief will not be refused to the injured party, because of a subsequent marriage contracted by the other party on faith of the decree of divorce. *Allen* v. *McClellan*, 12 Penn. St. 328 (1849). But the general rule is that no one not a party to a judgment can make direct application to have it annulled. *Baugh* v. *Baugh*, 37 Mich. 59 (1877). And where a departure has been made from this doctrine, it has been in favor of petitioners who have been prejudiced as to well-defined legal rights by the judgment in question. This question of practice is now commonly governed by statute.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF PERSONALTY—ADEQUACY OF LEGAL REMEDY. *Held*, That in a contract for the sale of certain live stock, the fact that the company who engaged to deliver said live stock had no other property in the State, and so was practically insolvent was ground *per se* for granting specific performance, as the insolvency made the legal remedy inadequate. *McNamara* v. *Home Land & Cattle Co.*, 105 Fed. 202 (Dec. 10, 1900).

This novel decision confuses adequacy of remedy at law with adequacy of the defendant's estate, and reaches a result which is supported by a few *dicta* merely. As Mr. Pomeroy says in Note 2, p. 34 of the Second Edition of his *Specific Performance*, after criticising a dictum of SIR JOHN LEACH'S in *Doloret* v. *Rothschild*, 1 S. & S., 590 (1824). "In a few early American cases, also, the insolvency of the defendant is stated as a partial reason or at least as a makeweight for granting the relief." There are a number of cases containing *dicta* to the same effect as the principal case, but most of them are to be explained as cases of enforcement of a trust of personal property. Of this nature are both the cases cited by the learned Judge, and the additional case cited for his view in the American and English Encyclopædia of Law, Vol. 22, page 992. *Clark* v. *Flint*, 22 Pickering, 231 (*Mass.*, 1839); *Parker* v. *Garrison*, 61 Ill. 250 (1871), and *Johnson* v. *Brooks*, 93 N. Y. 337 (1883).

FEDERAL PRACTICE—REMOVAL OF CAUSES. By an Indiana statute every railroad in the State is liable to an employee for all injuries caused by the negligence of a fellow-servant. In a joint suit by an injured employee against his fellow-servant and a non-resident corporation, *Held*, the cause of action was not separable and could not be removed to a Federal court. *Charman* v. *Ry. Co.*, 105 Fed. 449 (Ind. 1900).

The Federal courts have ruled that master and servant cannot be sued jointly for negligence of the servant where the master is not personally concerned in the negligence. *Warax* v. *Ry. Co.*, 72 Fed. 637 (1896). On this point of substantive law the principal case is not in conflict with the latter decision, since by another statute in Indiana master and servant may be sued jointly and the Federal court would necessarily follow the State ruling. *Connell* v. *Ry. Co.*, 13 Fed. Rep. 241 (1882). The Supreme Court has repeatedly affirmed that when a plaintiff has sued defendants jointly at law the case cannot be removed by a defendant whose citizenship is different from that of plaintiff, even though the alleged cause of action be joint and several. *The Removal Cases*, 100 U. S. 457 (1879); *Ayres* v. *Wiswall*, 112 U. S. 187 (1884); *Ry. Co.* v. *Martin*, 178 U. S. 245 (1900). The principal case seems to be correctly decided.

FEDERAL PRACTICE—RULES OF DECISION. Where by a decision of the highest court of a State the legal status of property has been determined

according to the laws of that State, *Held*, that decision cannot be collaterally assailed in a Federal court, the latter being bound by the decisions of the State courts. *State Trust Co.* v. *Machine Co.*, 105 Fed. 468 (C. C. A. 1900).

The case involves an application of the rule that a Federal court in interpretating State statutes as to property will always follow the decisions of the highest court of that State, and in that respect the decision is correct. *Holland* v. *Challen*, 110 U. S. 15 (1883); *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405 (1884). The statement in the head note of the principal case to the effect that where the legal status of the parties has been determined, the decision is not open to review, and the judgment binding on all parties is misleading, for the Court did not decide that point. Such a decision would violate the rule that judgments bind only the parties to the suit.

FIRE INSURANCE—WAIVER OF INCUMBRANCE PROVISION.—Insured, when asked by the agent of the company if there was any incumbrance on the boat, answered that he did not know. The agent volunteered to see the owner of the boat. The policy contained a provision rendering it void if the boat were encumbered and the incumbrance not noted in the policy. The boat was mortgaged and no reference to the mortgage was made in the policy. Held that the insurance company by its conduct had waived the warranty against incumbrance, and that plaintiff could recover. PARKER, C. J., GRAY and O'BRIEN, J.J., dissenting. *Skinner* v. *Norman as Tr.*, New York Law Journal, Febr. 25, 1901 (N. Y. Ct. of Appeals, Febr. 5, 1901). SEE NOTES.

INSURANCE—ONE YEAR TERM POLICY. A Vermont statute directs that foreign insurance companies shall be licensed only when they have proved that they possess assets equal in amount to their outstanding liabilities, "reckoning the premium reserve on life risks, based on the actuaries' tables of mortality as a liability." *Held*, a company may write and consider its first year insurance as term insurance, requiring no premium reserve. *Bankers' Life Insurance Company* v. *Insurance Commissioners*, decided in Vermont Jan. 30, 1901. SEE NOTES.

PARTY WALLS.—COVENANTS RUNNING WITH THE LAND—IMPLIED PROMISE.—Plaintiff, owner of two adjoining lots, built on lot X and conveyed to A. Lot Y he conveyed unimproved to B, by deed which provided that grantee, in accepting it, agreed for himself, his heirs and assigns, to pay plaintiff for so much of party wall standing on land conveyed as he or they might use. Defendant acquired both lots and used party wall. *Held*, B's covenant was personal, and plaintiff cannot recover. *Lincoln* v. *Burrage*, 59 N. E. 67 (Mass., Jan. 3, 1901). SEE NOTES.

PLEADING—COUNTERCLAIM—USURY—RECOVERY OF PENALTY—Defendant as maker of promissory note, in suit thereon by individual banker, counterclaimed under *Code Civ. Pro.*, §§ 501, 502, for the penalty, of twice amount of usurious interest paid, imposed by General Banking Law of N. Y. (Laws 1892, c. 689, § 55). *Held*, legislative intent was to place individual bankers and national banks on a complete equality. Hence penalty could only be enforced as provided by act of Congress, approved June 3, 1864 (13 Stat. 99, Sect. 30). *Barnet* v. *Bank*, 98 U. S. 555 (1878), having so held in the case of national banks. *Caponigri* v. *Altieri*, 59 N. E. 87 (Ct. of Appls., N. Y., Jan. 8, 1901).

Lewis v. *Bank*, 75 N. Y. 516 (1878), allowed such counterclaim as matter of procedure under Code. But on reargument, after decision in *Barnet* v. *Bank*, *supra*, *held* practice of a State in regard to set-offs or counterclaims cannot defeat object of Federal statute. 81 N. Y. 15 (1880). Where statute provides for a forfeiture, to be recovered by an action, the remedy thus given is exclusive and must be pursued. This case reaffirms and extends by analogy the doctrine so laid down.

PLEADING—HUSBAND AND WIFE—WIFE'S AGENCY TO CONTRACT FOR NECESSARIES. Declaration for goods sold and delivered to defendant at request

of his wife as agent. At trial it appeared defendant and wife had been separated eight years. *Held*, evidence admissible to show articles furnished wife were necessaries, as it did not tend to prove another cause of action. BARTLETT, VANN and GRAY, J.J., dissenting. *Hatch* v. *Leonard*, 59 N. E. 270 (N. Y., Feb. 1, 1901).

Where husband and wife have separated there is no longer necessarily a true agency, but as in case at bar, a more extensive "authority of necessity" or "agency implied in law." Schouler, *Domestic Relations*, §§ 61*n*, 64, 70; *Husband and Wife*, §§ 120, 123. A husband has been held liable for necessaries furnished against his express orders. *Cromwell* v. *Benjamin*, 41 Barb. 558 (1863). For reasonable legal expenses of wife in defence of prosecution instituted by himself. *Warner* v. *Heides*, 28 Wis. 517 (1871). And even in a just cause where he himself was person prosecuted. *Shepherd* v. *Mackoul*, 3 Camp. 326 (1808); *Morris* v. *Palmer*, 39 N. H. 123 (1859). Hence the authorities seem to justify minority opinion that under general allegation of agency only actual authority should be proved, whether express or implied in fact. Complaint should have stated facts from which authority could be implied.

POLICE POWER—LICENSES FOR BICYCLES. Requiring a license fee for riding bicycles on the streets is not an exercise of the police power of a municipal corporation. *People* v. *Bruce*, 63 Pac. 519 (Wash., 1901).

This case represents the generally accepted view that a bicycle being a reasonable means of locomotion and streets being public highways, the police power extends only to regulating the use of bicycles. *Thompson* v. *Dodge*, 58 Minn. 555 (1894); *Densmore* v. *City of Erie*, 20 Penn. Co. Ct. Rep. 513 (1898). A question about which there is no little confusion arises when it becomes necessary to decide what is a fee and what a tax. In a recent case where in order to support a legislative act it was necessary to refer a certain charge on bicycles to the police power, it was *held*, if the imposition is laid primarily for regulation it is referable to the police power, otherwise to the taxing power. *Ellis* v. *Frazier*, 63 Pac. 642 (Oregon, 1901).

This principle, misleading from a fiscal standpoint, has been generally accepted. The conflict in decisions arises when this test is applied. Often courts, owing to constitutional limitations or statutory restrictions, being unable to support a charge as a tax will refer it to the police power, where other courts, not so restricted refer the same charge to the taxing power. See *Mayor, etc.*, v. *2d Ave. Ry. Co.*, 32 N. Y. 261 (1865), and *Frankford Ry. Co.* v. *Phila.*, 58 Penn. 119 (1868).

PROPERTY—CHATTEL MORTGAGES—AVOIDANCE. *Held*, that the statutory right to set aside unrecorded chattel mortgages as void against creditors does not pass to the mortgagor's assignee for the benefit of his creditors to the exclusion of subsequent execution creditors. *Wimpfheimer* v. *Perrine*, 47 Atl. 769 (N. J. Eq., Dec. 1900).

This case follows closely the decision in *Shaw* v. *Glen*, 37 N. J. Eq. 32 (1883). In the same State it is held that the right to avoid conveyances fraudulent as to creditors passes to the assignee, *Pillsbury* v. *Kingon*, 33 N. J. Eq. 287 (1880). While there is a sharp conflict of authority as to these questions, the prevailing view seems to be that the assignee takes the debtor's property subject to all prior equitable liens. Many of the cases turn on the construction of particular statutes.

REAL PROPERTY—EASEMENTS—WAY OF NECESSITY. A railway had condemned a strip of land through the defendant's farm, *held* as a matter of law that the defendant had no right to a way across this strip from one to the other part of his farm. *A. T. & S. F. Ry. Co.* v. *Conlon*, 63 Pac. 432 (Kas., Jan. 1901).

There is a presumption of law that the parties understand that he who sells a portion of his land shall have a right of access to the remainder over the part sold, where such a right is indispensable to the beneficial enjoyment of the estate. *London* v. *Riggs*, 13 Ch. D. 798 (Eng., 1880); *Benedict* v. *Barling*, 79 Wis 551 (1891); *N. Y. & N. E. Ry. Co.* v.

Board of R. R. Comm'rs, 162 Mass. 81 (1894). Massachusetts has a peculiar doctrine that where land is taken by a railway under the right of eminent domain no such presumption can arise. This is solely by virtue of Gen. Stat. C. 3 Par. 7, in which "land" is defined to include "easements." The condemnation, therefore, is construed to leave outstanding no such right of necessity, *Googin* v. *Boston & Albany*, 155 Mass. 505 (1892). Except under some such statutory provision a way of necessity is to be recognized. The principal case should have followed *Kansas Central R. R. Co.* v. *Allen*, 22 Kas. 285 (1879). Construing Art. 9, Ch. 23, Gen. Stat. to permit the retention of the fee by the original proprietor of the land and his right for every purpose not incompatible with the rights of the railway. The company then had a right to fence up their road, if they required exclusive occupancy of the land, but whether they did require such exclusive occupancy was a question of fact and should not have been laid down as law.

REAL PROPERTY—ERRONEOUS SURVEY—ADVERSE POSSESSION. Adjoining land owners had a survey made of their dividing line, and they and their grantees acquiesced in the survey and occupied up to the line so run. It was subsequently found to be erroneous, and plaintiff sought to recover the strip belonging to him by a re-survey. Held, defendant having occupied the land in question as owner for the statutory period, acquired the title thereto by adverse possession [*Winn* v. *Abeles*, 35 Kan. 85 (1886), distinguished,] *Zimmerman* v. *Ginter*, 63 Pac. 657, Kansas, Jan. 1, (1901).

While other jurisdictions, in which the doctrine that adverse possession cannot be founded on mistake prevails, have drawn a similar distinction, *Heath* v. *Kirkpatrick*, 48 Iowa, 78 (1878), distinguishing *Grube* v, *Wells*, 34 Iowa, 148 (1871), the distinction here attempted—that in one case a survey was made, and none in the other—seems upon principle untenable. For in each the occupation followed from a mistake, in each the defendant occupied the land as his own, and clearly there was as much intention to possess to the exclusion of the true owner in the one, as in the other. While there is authority for the doctrine of *Winn* v. *Abeles*, the better opinion is that one taking possession of another's land and occupying it as his own so as to assert in fact a title against the true owner, is deemed to be in adverse possession, regardless of whether or no this entry was made through mistake. (*French* v. *Pearce*, 8 Conn. 439 (1831); *Alexander* v. *Wheeler*, 69 Ala. 332 (1881); *Eldridge* v. *Kenning*, 35 N. Y. S. R. 190 (1891). And see *Ramsey* v. *Glenney*, 45 Minn. 401 (1891), and *Wilson* v. *Hunter*, 59 Ark. 626 (1894), for holdings squarely opposed to *Winn* v. *Abeles*. However this may be, the authorities are almost at one upon the actual decision of the principal case. *Boyd* v. *Graves*, 4 Wheaton, 513 (1819); *Bauer* v. *Gottmanhausen*, 65 Ill. 499 (1872); *Main* v. *Killinger*, 90 Ind. 165 (1883); *Hoffman* v. *White*, 90 Ala. 354 (1890); *R'y Co.* v *Quain*, 94 Ky. 310 (1893); *Pearson* v. *Dryden*, 28 Or. 350 (1896). Contra, *Knowlton* v. *Smith*, 36 Mo. 507 (1865).

REAL PROPERTY—MORTGAGES—STATUTE OF LIMITATIONS—ADVERSE USE. *Held*, the statute runs against a mortgagee in favor of one who bought part of the mortgaged premises from the mortgagor without notice of the mortgage, though the interest on the mortgage has been regularly paid by the owner of the other part. *Mack* v. *Anderson*, 59 N. E. 289 (N. Y. Feb. 5, 1901); *Ely* v. *Wilson et al.*, 47 Atl. 806 (N. J. Ch., Dec. 27, 1900).

It is generally held that the mortgagee's full claim is kept alive by payments on the mortgage though made by the owner of only part of the property. *Chinnery* v. *Evans*, 11 H. L. Ca. 115, 132, 138, 139 (1864); *Pike* v. *Goodnow*, 12 Allen, 472 (Mass., 1866); and see *Jager* v. *Vollinger*, 174 Mass. 521, 524 (1899); *Barrett* v. *Prentiss*, 57 Vt. 297 (1884); *Cross* v. *Allen*, 141 U. S. 528 (1891); 2 JONES, *Mort.*, § 1198; *Longstreet* v. *Brown*, 37 Atl. 56 (N. J. Ch. 1897). Some color of authority for the present decision is found, however, in a dictum from *Depew* v. *Colton*, 46 Atl. 728 (N. J. Err. & App., 1900), and there is, perhaps, force in the suggestion that it imposes no greater hardship upon the mortgagee

than rests upon every owner out of possession. The very carefully considered decision in *Murdock* v. *Waterman*, 145 N. Y. 55 (1895), amply justifies the present holding in New York. *Boughton* v. *Van Valkenburgh*, 61 N. Y. Supp. 574 (1899).

REAL PROPERTY—RIPARIAN RIGHTS—ALLUVIUM. Defendant, in strengthening an embankment, so altered the course of a navigable stream as to stop an accustomed deposit of sand upon a strip of shore along which the plaintiff's farm abutted The strip whereon the deposit had formerly been made was covered by the ordinary high tides. This action was for damage caused plaintiff by depriving, both in the past and for the future, of alluvium, which, but for defendant's embankment, would have been deposited on the above strip of shore. *Held*, he might recover. *Freeland* v. *Pennsylvania Ry. Co.*, 45 Atl. 735 (Pa., Jan. 1901).

At common law a grant of land bounded by a navigable stream ended at high water mark, and the plaintiff would have had no title to the strip of shore in question. 3 *Kent. Com*. 12th ed. 427. *Middleton* v. *Pritchard*, 3 Seaman 510 (Ill. 1842). *U. S.* v. *Pacheo*, 2 Wall. 587 (U. S. 1864). But in Pennsylvania the riparian owner has the fee of the soil to ordinary low water mark, subject to public rights of fishing, etc 3 *Kent Com.* 427. *Lehigh Valley Ry. Co.* v. *Trone*, 28 Pa. St. 206 (1857). If the fee of the shore was in the plaintiff, the alluvium added by stream was his too, and his right to future alluvium was a vested right, for any disturbance of which the defendant would be liable. *St. Clair Co.* v. *Lovingston*, 23 Wall. 46 (U. S., 1874). *Municipality No. 2* v. *Orleans Cotton Press*, 18 La. Rep. 122 at p. 213 (1841). *Chapman* v. *Hoskins*, 2 Md. Ch. 485 (1851). Further, the plaintiff, being a riparian owner, had a right that the course of the stream should not be varied to his damage by a superior owner. *Embrey* v. *Owen*, 4 Eng. Law & Eq. Rep. 466 (1851). *Gerrish* v. *Clough*, 48 N. H. 9 (1868).

REPLEVIN—WHEN THE ACTION WILL LIE. Sale of goods from plaintiff to defendant induced by latter's fraud. Before any rescission by plaintiff, goods seized on lawful execution, which defendant could not resist. *Held*, plaintiff cannot then maintain replevin. *Sinnot* v. *Feicock*, 59 N. E. 265 (Ct. of App., N. Y., Feb. 1, 1901).

At common law replevin lay, by any one with immediate right to possession, for specific goods unlawfully taken and detained and in possession of defendant. *Panghorn* v. *Patridge* 7 Johns. 140 (1810); *Morris on Replevin*, Ch. II. But scope of remedy has been greatly extended by statute. In N. Y. by 2 *R. S.*, 522, §§ 11, 19; and *Code of Procedure* of 1848, Title 7, Pt. 2, C. 2, Secs. 206, 207, it was made co-extensive with detinue, thereby abolished. Two English cases, *Garth* v. *Howard*, 5 C. & P. 346 (1832), *Jones* v. *Dowle*, 9 M. & W. 19 (1841). PARKE, B., held defendant liable in detinue where once he had had possession but wrongfully pledged before action brought. *Nichols* v. *Michael*, 23 N. Y 264 (1861), applied doctrine to replevin. Reaffirmed under *Code Civ. Pro.*, Sects. 1689–1730—that where defendant has voluntarily parted with possession or control replevin will lie even though property be beyond reach of Court. *Barrett* v. *Selling*, 70 N. Y. 482 (1877). Plaintiff in main case urged intent of revisers (*R. S*, Title 12, Pt. 3, c. 8) to make replevin "concurrent" with trover, but court refused to extend decisions to case where property destroyed without defendant's fault or seized on lawful process. *Brumley* v. *Lambert*, 1 Wash. (Va.) 308 (1793); *Pool* v. *Adkisson*, 1 Dana (Ky.) 110 (1833); *Caldwell* v. *Fenwick*, 2 Dana 333 (1834), *accord*. Other jurisdictions are more conservative. *Gildas* v. *Crosby*, 61 Mich. 113 (1886), under statute similar to N. Y., held defendant must have parted with possession with intent to avoid writ. Wis., *Semble*, *accord*. In Mass. defendant must be in possession when action brought. *Hall* v. *White*, 106 Mass. 599 (1871). N. H., Iowa, Mo., Me., Minn., N. C., *accord* Ky. and Va. (*supra*) hold like N. Y.

SURETYSHIP—SUBROGATION OF CREDITOR TO SECURITIES HELD BY SURETY. Principal debtor mortgaged leaseholds as personal indemnity to mortgagee

for guaranteeing former's note. Mortgagee agreed to satisfy mortgage, but then asserted inability to perform, before payment of note, without assent of holder. *Held*, as both principal and surety were solvent, creditor had no interest in mortgage, and mortgagee must perform. *Fertig* v. *Henne*, 47 Atl. 840 (Sup. Ct. of Pa., Jan. 7. 1901).

Interesting as adopting modern English rule, that securities given by creditor to surety for personal indemnity only, form part of general assets of surety. The prevailing American, like the early English, doctrine makes surety hold as trustee for creditor from moment securities are received. Brandt (*Suretyship*, 2d ed. §§ 324–328) accepts this theory unreservedly, without noticing discovery of later English cases that it rests on mere dictum of *Maure* v. *Harrison*, 1 Eq. cases, Abridg. 93 (1692), supposed to have been followed by LORD ELDON in *Ex Parte Waring*, 2 Glyn & Jameson 404 (1815), and since expressly overruled. *Royal Bank* v. *Commercial Bank*, L. R. 7 App. Cases 366 (H. of L., 1882); *Re Walker*, L. R. 1 Ch. (1892) 621. The number of exceptions found by American courts would tend to prove soundness of English rule. See Ames *Cases on Suretyship*, 620*n*, 641, 644*n*. In N. Y. and the Federal courts (*Semble*) the general American doctrine obtains. *Merchants' Bank* v. *Cummings*, 149 N. Y. 360 (1896); *Chamberlain* v. *St. Paul Co.*, 92 U. S. 299, 306 (1875). These cases of personal indemnity should be carefully distinguished from those of express trust for the benefit of creditors, the security being given as collateral for the debt proper.

TORTS—DISCHARGE OF SERVANT CAUSED BY FALSE STATEMENTS OF THIRD PARTY—LIABILITY TO SERVANT. The plaintiff was engaged as a servant, the employment being at will. Defendant, with malicious motives, made false statements concerning him, thereby causing his discharge. *Held*, he might recover against defendant, although the master did no wrong in discharging him. *Moran* v. *Damphey*, 59 N. E. 125 (Mass., Jan. 1901).

It is generally held that no action will lie for causing the discharge of another, where that is no contract liability on the part of the employer. *Allen* v. *Flood*, Ap. Cases, 1898, 1 (House of Lords). *Payne* v. *Ry. Co.*, 13 Lea 507 (Term 1884). *Heywood* v. *Fillson*, 75 Me. 225 (1883). To this doctrine the Massachusetts cases are an exception. *Walker* v. *Cronin*, 107 Mass. 554 (1871). The holding of the Court that though an act be in itself lawful, yet if it be done with malicious motives, it may become unlawful, does not express the general rule. *Allen* v. *Flood*, *supra*. *Phillips* v. *Nowlan*, 73 N. Y. 39 (1878). *Rideout* v. *Knox*, 148 Mass. 368 (1889). The latter case was decided by HOLMES, J., who also decided the principal case. The same judge, in 8 *Harv. Law Rev.* 1 (1894) makes a distinction between the malicious exercise of a right incident to the ownership of real property, and one not so.

Finally, it may be said, that through the disturbance of another's business, caused by means in themselves unlawful, such as intimidation [*Tarleton* v *McGawley*, Peake 205 (K. B. 1790)], is an actionable wrong, yet to accomplish the same results by false statements is not generally so considered, unless the statements be in themselves defamatory. 8 East 1 (1807). *Cooley on Torts*, Chicago, 1888, p. 79.

TORTS—MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTOR. A municipality, acting under statutory authority, contracted for the digging of a public sewer in the street, reserving to itself the right to inspect the work and to discharge workmen. *Held*, it is not liable for consequential injuries to the plaintiff's house from the settling of the soil, due to the contractor's negligence, though this result had been foreseen by the city's engineers. *Uppington* v. *City of New York*, 165 N. Y. 222; 59 N. E. 91 (Jan. 8, 1901).

The propositions on which this case is vested are well established in New York by a line of cases culminating in *Atwater* v. *Trustees*, 124 N. Y. 602 (1891), on the one hand, and *Berg* v. *Parsons*, 156 N. Y. 109 (1898), on the other, though a better rule is that contended for by GRAY, J., dissenting in the latter case, that the employer is liable when the work con-

tracted for is inherently dangerous; and this properly covers cases where the resulting injury was anticipated by the employee. *Bonaparte* v. *Wiseman*, 42 Atl. 942 (Md., 1899). The reason is not altogether apparent for separating, in legal effect, the act itself from its foreseen consequences, unless the duty of the State to provide compensation for the taking of property is directly involved; nor does this necessarily result from *Benner* v. *Atlantic Dredging Co.*, 144 N. Y. 156 (1892). This holding does not of course at all lessen the city's responsibility for obstructions in the highway of which it has notice. *Schumacher* v. *New York*, *N. Y. Law Jour.* (March 9, 1901).

TRUSTS—GIFT ATTEMPTED WITHOUT DELIVERY. X with his own money bought stock certificates and made a bank deposit, both in his wife's name, but did not communicate the fact to her, and himself retained the certificates and pass books and received the dividends. After the wife's death the bank reissued the certificates in X's name and paid the deposit to him. *Held*, the wife's administrator cannot recover from the bank. *Getchell* v. *Biddeford Sav. Bank*, 47 Atl. 895 (Me., Dec. 18, 1900).

The want of delivery to or acceptance by the supposed donee is fatal. *Beaver* v. *Beaver*, 137 N. Y. 59, 67 (1893); *Sherman* v. *Bank*, 138 Mass. 541 (1885). The contrary ruling as to bank shares in *Standing* v. *Bouring*, 31 Ch. Div. 282 (1885), was based on the ground that control had, in fact, passed out of the donor (p. 290), and that and the similar case of *Read* v. *Roberts*, 85 Pa. 84 (1877), if they are to be supported, may be distinguished from the present on the ground that in them the intention, at least, to make a gift was shown. While notice to the *cestui que trust* is unnecessary: *Farleigh* v. *Cadman*, 159 N. Y. 169 (1899); *Robertson* v. *McCarty*, 54 App. Div. 103 (N. Y., 1900), no intention on the part of the husband to become trustee, as in those cases, existed here, and he could not be so regarded if "he had the stocks and money put in his wife's name thereby to *become* her property in case she should survive him." *Sullivan* v. *Sullivan*, 161 N. Y. 554 (1900). But, assuming that the husband might have been charged as trustee, no liability existed on the part of the bank after payment to him. *Thomassen* v. *Van Wyngaarden*, 65 Ia. 687 (1885).

TRUSTS—LIFE TENANT *vs.* REMAINDERMAN—SINKING FUND TO OFFSET PREMIUM PAID FOR BONDS. Devise to trustee "to collect and receive the rents, income in dividends, and profits, and apply same to use of A for life," with remainder over. Full power given trustee to invest in U. S. bonds. *Held*, trustee should have retained so much of interest during life of A as was necessary to offset premium paid for bonds, meet loss on their being paid off at maturity, and keep principal intact. O'BRIEN, J., dissenting. *N. Y. Life Ins. & Trust Co.* v. *Baker*, 59 N. E. 257 (Ct. of App., N. Y., Feb. 5, 1901).

The authorities agree any clear expression of intention in the will is controlling, but in absence of such expression decisions are conflicting and unsatisfactory. In England, no part of the annual income is to be set aside to indemnify the remainderman. 2 *Perry on Trusts*, § 547; *Lewin on Trusts*, 9th Eng. ed., 318-326, Mass. in general accords, though preferring to deal with each case as it arises rather than lay down a universal rule. *Hemenway* v. *Hemenway*, 134 Mass. 447 (1883); *Shaw* v. *Cordis*, 143 Mass. 443 (1887). But cf. *Trust Co.* v. *Eaton*, 140 Mass. 532 (1886), *semble contra*. In *McLouth* v. *Hunt*, 154 N Y. 179 (1897), decision by O'BRIEN, J., in favor of life tenant, proceeded on intent as shown in will. But *Matter of Hoyt*, 160 N. Y. 607 (1899), appears squarely *contra* to the case at bar. Wording similar, yet *held* "clearly impossible, in giving language of will its plain meaning, to spell out intent to provide a sinking fund." PARKER, C. J., GRAY and HAIGHT, JJ., dissenting. In absence of contrary intention in will, on principle, loss should be borne by remaindermen, the increased security of investment being for his benefit. See *Hemenway* v. *Hemenway*, *supra;* and cf. *Hite* v. *Hite*, 93 Ky. 257 (1892), favoring life tenant.